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Paper No. 4

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OCT 14 2004

OFFICE OF PETITIONS

In re Application of :
Cannon, et al. :
Filed: March 16, 2004 : ON PETITION
Application No. 10/801,319 :
Atty. Dkt. No.: LE-2002-0314.02 :

This decision in response to the "RESPONSE TO NOTICE OF OMITTED ITEM(S) IN A NONPROVISIONAL APPLICATION FILED UNDER 37 CFR 1.53(b)," filed July 27, 2004, in response to the "Notice of Omitted Items in a Nonprovisional Application ("Notice") mailed June 1, 2004.

The application was filed March 16, 2004. The Notice indicated that the application had been accorded a filing date but that figures 21-30 appeared to have been omitted from the specification.

The Notice permits applicant to either: (1) promptly establish prior receipt in the PTO of the drawing(s) at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted drawing(s) in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the missing drawings were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted drawings in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted drawing(s) with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such drawing(s) and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the Notice (37 CFR 1.181(f)).

In response to the Notice, petitioners submitted the omitted items and indicated that the items are part of the disclosure of U.S. App. No. 10/327,761.

Petitioners request, in effect, that figures 21-30 be entered into the record and that the application be accorded a filing date of March 16, 2004.

It is noted that the application transmittal letter for the instant application contains an incorporation statement. An incorporation by reference statement may be relied upon to permit the entering of a portion of the prior application into the continuation or divisional application when the portion of the prior application has been inadvertently omitted from the submitted application papers in the continuation or divisional application. The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuation or divisional application to include any subject matter in such prior application(s), without the need for a petition provided the continuation or divisional application is entitled to a filing date notwithstanding the incorporation by reference. See, MPEP 201.06(c).

Based on petitioner's representation that Figures 21-30 are part of the disclosure of application No. 10/327,761 and the entire disclosure of application No. 10/327,761 was specifically incorporated by reference in the present application on March 16, 2004, it appears that Figures 21-30 were present in the Office on March 16, 2004, albeit in the file of another application, i.e., application No. 10/327,761. Therefore, on petition, the application may be accorded the requested filing date.

Petitioner is advised to promptly submit a second preliminary amendment requesting entry of the omitted figures prior to the issuance of the first Office action on the merits.

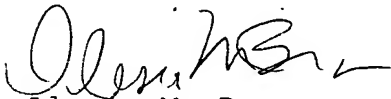
A newly executed oath or declaration is not required under 37 CFR 1.51(b)(2) and 1.53(f) in a continuation or divisional application, provided that the specification and drawings filed in the continuation or divisional application contain no matter that would have been new matter in the prior application. See 37 CFR 1.63(d)(1). For initial processing purposes, it is presumed that Figures 21-30 submitted with the instant petition, contains no matter that would have been new matter in the prior application. Thus, the application will be processed using the copy of the declaration deposited on March 16, 2004.

The required petition fee of \$130.00 will not be refunded since the petition was necessary to correct petitioner's filing error.

In view of the above, the petition is DISMISSED.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of March 16, 2004 using the papers present on that day.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3205.

A handwritten signature in black ink, appearing to read 'Alesia M. Brown', with a stylized flourish at the end.

Alesia M. Brown
Senior Petitions Attorney
Office of Petitions